

IN THE DISTRICT COURT OF THE VIRGIN ISLANDS  
DIVISION OF ST. THOMAS AND ST. JOHN

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UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	CRIM. NO. 2015-42
	)	
WAYNE JAMES,	)	
Defendant.	)	
_____	)	

REPORTER'S TRANSCRIPT

MOTION HEARING

Thursday, July 13, 2017

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BEFORE: THE HONORABLE CURTIS V. GOMEZ  
District Judge

APPEARANCES: OFFICE OF THE UNITED STATES ATTORNEY  
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For the Government

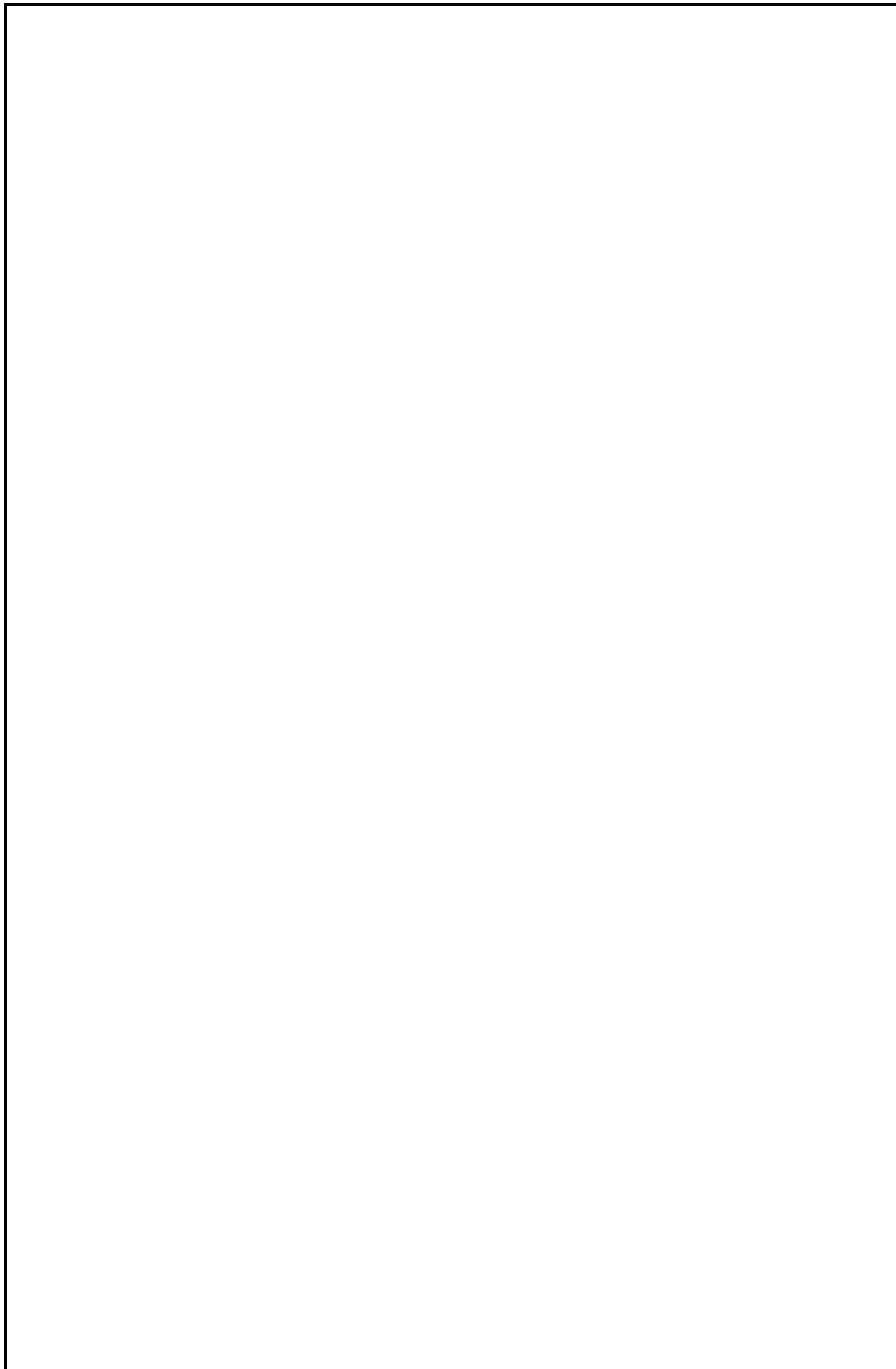
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Official Court Reporter  
Virgin Islands District Court  
St. Thomas, Virgin Islands

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(Court recessed)

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PROCEEDINGS

14:35:36 3 (Court called to order at 2:35 p.m.)

14:35:36 4 THE CLERK: United States of America versus  
14:35:37 5 Wayne James.

14:35:42 6 Please enter your appearances.

14:35:46 7 MS. VAUGHN: Good afternoon, Your Honor.  
14:35:47 8 Amanda Vaughn of the United States.

14:35:49 9 THE COURT: Good afternoon, Attorney Vaughn.

14:35:52 10 MS. VAUGHN: And at counsel's table with me --

14:35:54 11 THE COURT: Speak right into the microphone so  
14:35:56 12 we can hear you well.

14:35:59 13 MS. VAUGHN: At counsel's table with me is  
14:36:02 14 Agent Christopher DeGraff of the FBI.

14:36:06 15 MR. JUPITER: Good afternoon, Your Honor.  
14:36:07 16 Omodare Jupiter on behalf of Wayne James, who is  
14:36:10 17 present.

14:36:10 18 THE COURT: Okay. Good afternoon, Attorney  
14:36:11 19 Jupiter.

14:36:12 20 Okay. We are here on the defense motion to  
14:36:18 21 dismiss. I think where we left it was the Court had a  
14:36:25 22 hearing. I made a ruling. I said it was without  
14:36:28 23 prejudice.

14:36:31 24 There was supplemental information to be filed.  
14:36:33 25 The defense filed, then appealed. And the circuit

14:36:38 1 dismissed the appeal, saying there ought to be a ruling  
14:36:43 2 before the matter is subject to appeal. Now, there is  
14:36:50 3 supplemental information on the record.

14:37:01 4 So let's hear from the government first. Where are  
14:37:04 5 we, Attorney Vaughn?

14:37:06 6 ARGUMENT BY THE GOVERNMENT

14:37:06 7 MS. VAUGHN: Yes, Your Honor. It's the  
14:37:09 8 government's position that none of the supplemental  
14:37:13 9 material changes the outcome here. The Court had  
14:37:17 10 previously denied the motion without prejudice, and it's  
14:37:21 11 the government's position that even given the  
14:37:24 12 supplemental material, the Court should finally deny the  
14:37:27 13 motion to dismiss.

14:37:30 14 THE COURT: Now, the supplemental material  
14:37:32 15 points to the testimony of -- or at least in some part  
14:37:37 16 to one of the witnesses who speaks about educational  
14:37:43 17 inquiries that were undertaken. Why is that not part of  
14:37:49 18 the Speech or Debate Clause inquiry?

14:37:52 19 MS. VAUGHN: Is Your Honor referring to the  
14:37:55 20 grand jury testimony?

14:37:56 21 THE COURT: Yes.

14:37:58 22 MS. VAUGHN: So --

14:37:59 23 THE COURT: Because, as I understand it, it  
14:38:01 24 seems that the defense is taking a two-pronged  
14:38:06 25 approach.

14:38:06 1 One is that the indictment covers speech or debate  
14:38:11 2 acts that are properly -- that are not properly the  
14:38:14 3 subject of an indictment. And to the extent that the,  
14:38:21 4 that there isn't a clear violation of the Speech or  
14:38:27 5 Debate Clause there, and as I understand it, the defense  
14:38:29 6 is saying that the grand jury was so permeated with  
14:38:32 7 exposure to Speech or Debate Clause material that it  
14:38:38 8 warrants the treatment that the Court said was  
14:38:41 9 appropriate in Helstoski.

14:38:46 10 So the Court is of a sense that we covered a lot of  
14:38:49 11 ground with respect to the first prong. So we're  
14:38:52 12 dealing with the second prong here, and that requires, I  
14:38:55 13 sense from Helstoski -- there's not much case law that  
14:39:00 14 takes this approach, but in Helstoski there's some  
14:39:03 15 review and assessment of the grand jury testimony.

14:39:06 16 And to the extent the grand jury testimony is the  
14:39:12 17 thing that's an indicator of whether there was a lot of  
14:39:14 18 exposure to material that they ought not to have been  
14:39:19 19 exposed to, and that permeated the whole grand jury  
14:39:26 20 proceeding, to the extent that is what the inquiry needs  
14:39:31 21 to focus on, should the Court have some pause that there  
14:39:34 22 was some discussion about the educational inquiry that  
14:39:45 23 Senator James was concerned with? Why is that, why is  
14:39:48 24 that even appropriately before the grand jury?

14:39:52 25 MS. VAUGHN: Your Honor, I think looking at

14:39:54 1 Helstoski -- so if we've decided that the indictment on  
14:39:57 2 its face does not allege any legislative acts, and then  
14:40:01 3 we look at what was presented to the grand jury --

14:40:03 4 THE COURT: To be fair to the defense, we'll  
14:40:05 5 revisit that, too, just to make sure we're comprehensive  
14:40:07 6 here. But, yeah, we'll just focus on the second prong  
14:40:10 7 for now.

14:40:11 8 Go ahead.

14:40:11 9 MS. VAUGHN: So, one, even if there -- it's  
14:40:16 10 sort of a two-part question. One is, if there was  
14:40:20 11 evidence of legislative agents presented to the grand  
14:40:23 12 jury, that, in and of itself, is not a basis for  
14:40:25 13 dismissal.

14:40:26 14 It's only a basis for dismissal where the  
14:40:32 15 indictment would not have been returned absent that  
14:40:37 16 evidence. So that's the first question -- that's the  
14:40:40 17 first issue. Even if it was presented, it's not a  
14:40:44 18 proper basis if the indictment still would have been  
14:40:47 19 returned.

14:40:47 20 And I think that the fact that the indictment on  
14:40:49 21 its face does not allege any official acts --

14:40:51 22 THE COURT: Let's deal with the first part.  
14:40:53 23 That is, are there portions of the transcript that get  
14:40:58 24 into material that you shouldn't have gotten into?

14:41:01 25 MS. VAUGHN: No, Your Honor.

14:41:02 1 THE COURT: Okay. Pages 10 through 12, then,  
14:41:05 2 of the transcript that talks about the educational  
14:41:09 3 inquiry, why is that necessary?

14:41:11 4 MS. VAUGHN: Your Honor, I don't have the  
14:41:13 5 transcript in front of me, but I think what Your Honor  
14:41:14 6 is referring to is when the grand jury witness is  
14:41:17 7 discussing that this was in -- this was to prepare for  
14:41:20 8 legislation?

14:41:23 9 THE COURT: Yes.

14:41:24 10 MS. VAUGHN: So --

14:41:24 11 THE COURT: Well, I'm going to say yes, but,  
14:41:27 12 yeah, I'd prefer you refer to the transcript, not my  
14:41:30 13 recollection.

14:41:30 14 MS. VAUGHN: That in itself is a post hoc  
14:41:36 15 rationalization that is undermined by the  
14:41:38 16 contemporaneous communications by the defendant. So and  
14:41:44 17 -- so that's first.

14:41:47 18 And second, that witness was, herself, inconsistent  
14:41:52 19 about what the purpose of this work was for.

14:41:55 20 THE COURT: What was the question that  
14:41:57 21 generated the response, though?

14:42:00 22 MS. VAUGHN: I'm -- I can try to pull up the  
14:42:02 23 transcript.

14:42:03 24 THE COURT: Okay. Well, was there a question  
14:42:05 25 from the government that generated the response? My



14:42:07 1 question is really one that goes to: Why was there a  
14:42:10 2 need for a question that would generate that response?

14:42:15 3 MS. VAUGHN: I think the question was something  
14:42:17 4 along the lines of -- I can see if I can find it real  
14:42:20 5 fast, Your Honor. I'm sorry --

14:42:21 6 THE COURT: If you need to grab the transcript,  
14:42:23 7 you can go right ahead and do that.

14:42:44 8 MS. VAUGHN: You said pages 10 through 12, Your  
14:42:47 9 Honor?

14:42:47 10 THE COURT: Yes, or thereabouts.

14:43:23 11 MS. VAUGHN: So there was a question, "What did  
14:43:25 12 Mr. James propose to do during his tenure in the Senate  
14:43:29 13 related Fireburn?"

14:43:30 14 So that question --

14:43:31 15 THE COURT: Why is that necessary?

14:43:33 16 MS. VAUGHN: Well, it goes to the heart of why  
14:43:35 17 he was submitting -- what he was claiming this money was  
14:43:38 18 going to be for. That's part of the misrepresentation  
14:43:41 19 he made to the Legislature. He claims the money was for  
14:43:46 20 research related to Fireburn, in fact he instead  
14:43:50 21 pocketed the money and used it for his personal  
14:43:53 22 expenses.

14:43:53 23 THE COURT: The question is: What was he going  
14:43:55 24 to do during his tenure in the Senate related to  
14:43:58 25 Fireburn?

14:43:59 1 It wasn't so much how he billed. I know there was  
14:44:02 2 discussion in the transcript about the billing process  
14:44:05 3 and travel, et cetera, which I think Lee and certainly  
14:44:08 4 other cases make clear that the travel, in and of  
14:44:11 5 itself, is not speech or debate material, unless that's  
14:44:13 6 the subject of the legislation.

14:44:15 7 But in this case you're asking him what's he going  
14:44:18 8 to do during his tenure. Why is that necessary to, to  
14:44:24 9 get to what I think is what has been charged here, which  
14:44:27 10 I thought were along the lines of, one, billing for  
14:44:31 11 expenses incurred before he was a senator, billing for  
14:44:35 12 things he had already billed for, and billing for -- or  
14:44:41 13 receiving funds and converting those funds to his own  
14:44:44 14 use.

14:44:45 15 Why, why is it necessary to ask the question:  
14:44:47 16 What's he going to do during his tenure?

14:44:51 17 MS. VAUGHN: Yes. And the question -- I think  
14:44:52 18 it's important that the question is worded as: What did  
14:44:55 19 he propose to do?

14:44:58 20 Promises of future acts is not, is not a protected  
14:45:03 21 legislative act. So what he proposed to do falls well  
14:45:06 22 outside of the realm of what is protected under the  
14:45:09 23 Speech or Debate Clause.

14:45:11 24 And then this question specifically is important  
14:45:14 25 to, was important in this investigation, although not

14:45:17 1 essential to the indictment.

14:45:19 2 I concede that. This question is not essential to  
14:45:23 3 obtain the returning of the indictment. But it is  
14:45:26 4 relevant to the general investigation that was being  
14:45:28 5 conducted, because part of the inquiry was whether the  
14:45:31 6 defendant was misrepresenting what he was doing in  
14:45:35 7 relation to Fireburn.

14:45:37 8 THE COURT: Assuming that that area of inquiry  
14:45:41 9 during the grand jury was something that certainly, that  
14:45:45 10 wasn't necessary, and arguably in violation of the  
14:45:49 11 Speech or Debate Clause, what, what should the Court  
14:45:52 12 look at next?

14:45:54 13 MS. VAUGHN: So the Court should look at if the  
14:45:56 14 indictment would have been returned absent that  
14:45:58 15 question, if the Court ultimately deems that question  
14:46:01 16 improper.

14:46:02 17 THE COURT: So is that a question of volume or  
14:46:09 18 primacy or of several other things, including those  
14:46:12 19 things, to determine whether it permeated the whole  
14:46:15 20 grand jury hearing?

14:46:15 21 MS. VAUGHN: It's really just a question of  
14:46:18 22 given the allegations in the indictment -- I mean, under  
14:46:21 23 McDade you could have explicitly an allegation in the  
14:46:24 24 indictment that is a legislative act. And even if that  
14:46:28 25 single allegation must be struck, if the counts still

14:46:33 1 stand --

14:46:33 2 THE COURT: But McDade wasn't a case where they  
14:46:36 3 were digging into the grand jury testimony the way the  
14:46:39 4 Court did in Helstoski, correct?

14:46:42 5 MS. VAUGHN: McDade was not.

14:46:43 6 THE COURT: Right. McDade, they were looking  
14:46:45 7 more at the face of the indictment and making an  
14:46:48 8 assessment on its face. And that's why I posited here,  
14:46:53 9 I sense that the defense is doing two things. One is  
14:46:56 10 looking at the face of the indictment and saying it's  
14:46:58 11 problematic, and two, going behind the indictment and  
14:47:03 12 looking at the grand jury hearing and saying it is so  
14:47:06 13 permeated with violations that it's worthy of a  
14:47:08 14 Helstoski type of remedy.

14:47:10 15 So I'm just focusing right now on the grand jury  
14:47:13 16 and determining whether it's so permeated. And my sense  
14:47:18 17 would be is that if there is quite a volume of reference  
14:47:22 18 to arguably unnecessary, arguably improper questioning,  
14:47:28 19 then I would sense that there is the level of permeation  
14:47:32 20 that warrants a Helstoski sort of remedy. So speak to  
14:47:37 21 that point.

14:47:38 22 MS. VAUGHN: Well, first, Your Honor, this  
14:47:40 23 transcript is only one of four witnesses who were in  
14:47:42 24 front of the grand jury for, in this investigation. And  
14:47:48 25 it was through a different witness -- and the government

14:47:51 1 can submit that transcript to the Court, if it would  
14:47:53 2 like. It was through --

14:47:54 3 THE COURT: Well, whose burden is it? It's the  
14:47:57 4 defense's burden, isn't it, at this stage?

14:47:59 5 MS. VAUGHN: It is the defense's burden, yes,  
14:48:01 6 Your Honor.

14:48:01 7 THE COURT: All right. Go ahead.

14:48:05 8 MS. VAUGHN: But you can't -- it's not whether  
14:48:06 9 it permeated the grand jury proceedings. The question  
14:48:09 10 is whether the evidence that the Court deems problematic  
14:48:12 11 was essential to the indictment. And here, this one  
14:48:18 12 question and answer, one, is not referenced in the  
14:48:23 13 indictment, and it's just a small piece of what was  
14:48:26 14 presented to the grand jury.

14:48:27 15 What was presented to the grand jury through other  
14:48:29 16 testimony was every single invoice that -- every single  
14:48:34 17 cash advance request that the defendant submitted  
14:48:36 18 related to Fireburn, and his contemporaneous e-mails,  
14:48:41 19 financial records, demonstrating that he did not use the  
14:48:44 20 money for what he claimed he would, but, in fact,  
14:48:46 21 pocketed.

14:48:47 22 That all came in through another witness, and  
14:48:50 23 that's what's in the indictment.

14:48:52 24 This witness was only one of four. And, again, the  
14:48:57 25 government would argue that this question, what he

14:49:00 1 proposed to do is not seeking evidence of legislative  
14:49:03 2 acts in the first place. It's asking what his proposal  
14:49:05 3 was. And a promise to perform future legislative acts  
14:49:08 4 is not, is not a protected act.

14:49:16 5 THE COURT: Okay. Let me hear you on the first  
14:49:18 6 part now, which is the face of the indictment.

14:49:21 7 MS. VAUGHN: Yes, Your Honor.

14:49:26 8 As the government did in its proposed findings it  
14:49:32 9 submitted to the Court, if the Court were to go through  
14:49:35 10 a paragraph-by-paragraph analysis of the indictment,  
14:49:40 11 it's clear that not a single one of the allegations  
14:49:42 12 turns on evidence of legislative acts.

14:49:44 13 And, again, I would point out that, I would first  
14:49:46 14 point out that the defendant has not identified which  
14:49:49 15 allegations he actually believes allege legislative  
14:49:53 16 acts. He's made a general claim that the indictment  
14:49:55 17 turns on legislative acts.

14:49:56 18 So that's why it's necessary, without the defendant  
14:49:58 19 identifying specifically which allegations he finds  
14:50:01 20 problematic, to do a paragraph-by-paragraph analysis of  
14:50:04 21 --

14:50:04 22 THE COURT: There's a count that goes to, use  
14:50:08 23 converting funds that were supposed to be paid to the  
14:50:11 24 archives, the Danish National Archives, a portion of  
14:50:15 25 which I suggest the government suggests was used to

14:50:17 1 legitimately pay off the debts incurred at Danish  
14:50:23 2 National Archives.

14:50:23 3 And then there's a portion that was, I think,  
14:50:28 4 suggested or indicated in the indictment that was  
14:50:32 5 converted to personal use. Is that the government's  
14:50:35 6 theory?

14:50:35 7 MS. VAUGHN: Yes, Your Honor.

14:50:36 8 THE COURT: Okay. Is there any concern that  
14:50:39 9 because of the reference to the portion that's  
14:50:42 10 legitimate with the objectionable conduct, that that  
14:50:48 11 implicates the Speech or Debate Clause?

14:50:51 12 MS. VAUGHN: Not at all, Your Honor. So the  
14:50:53 13 defendant submitted invoices, some of which, the  
14:50:57 14 government concedes, he ended up sending money to the  
14:51:01 15 intended recipient for, most of which he did not. He  
14:51:06 16 pocketed it.

14:51:07 17 And the actual charges, the wire fraud charges and  
14:51:10 18 the embezzlement charge, span a time period in 2010 in  
14:51:15 19 which he -- the government alleges, the indictment  
14:51:18 20 alleges, that he just pocketed the money. So it's  
14:51:21 21 complete fraud. And that's the essential time period.

14:51:25 22 Then looking at the general scheme, which does  
14:51:27 23 extend all the way back to the beginning, as the  
14:51:30 24 government showed through the exhibits it submitted  
14:51:32 25 originally, the defendant was submitting requests to the

14:51:36 1 legislature based on work that he had sought or that he  
14:51:39 2 had obtained prior to even his election to the  
14:51:43 3 legislature. And work and conduct before someone's even  
14:51:47 4 in the legislature cannot be deemed legislative acts.

14:51:51 5 THE COURT: No, you can bypass that for the  
14:51:57 6 moment.

14:51:57 7 MS. VAUGHN: And then it's the government's  
14:51:59 8 allegation that even to the -- I want to back up for one  
14:52:05 9 moment.

14:52:06 10 Nowhere in the indictment does it allege  
14:52:10 11 legislative fact-finding. And that's really the only  
14:52:12 12 bucket in which we could be anywhere close here. And  
14:52:16 13 nowhere does the indictment allege legislative  
14:52:19 14 fact-finding.

14:52:20 15 It alleges basically the defendant submitted an  
14:52:22 16 invoice request, which we know from Lee is not  
14:52:25 17 protected. He received money from that request, which  
14:52:28 18 we also know is not protected, because the pay function  
14:52:32 19 is completely unrelated to the deliberative and  
14:52:36 20 communicative processes of the legislature.

14:52:38 21 So he submitted his request. He received the money  
14:52:40 22 and he cashed the check and pocketed it. That's the  
14:52:43 23 government's allegation. Or he cashed the check and he  
14:52:45 24 used it for some purpose that was not what he had told  
14:52:48 25 the legislature he was going to use it for.



14:52:51 1 And so the cashing of the checks is also not a  
14:52:53 2 protective legislative act. The only thing that is  
14:52:57 3 protected is something that's an integral part to the  
14:53:00 4 deliberative and communicative processes of the  
14:53:03 5 legislature, and the indictment nowhere alleges that.

14:53:06 6 And I understand the defendant has submitted in his  
14:53:08 7 supplemental materials, hearing transcripts, he  
14:53:11 8 submitted bills, but neither of those things are  
14:53:14 9 referenced in the indictment in any way.

14:53:17 10 And the fact that it might be a centennial  
14:53:20 11 celebration or it might be a Fireburn day, the fact that  
14:53:23 12 the defendant can identify things covering the same  
14:53:26 13 topic does not render all of his act -- all of his acts  
14:53:30 14 related to that topic as protected legislative acts.

14:53:34 15 As the Supreme Court made clear in Gravel, it is  
14:53:37 16 not anything in any way related to the legislative  
14:53:41 17 process that deemed something to be a legislative act.

14:53:44 18 THE COURT: All right. Thank you, Attorney  
14:53:47 19 Vaughn.

14:53:47 20 Attorney Jupiter.

14:54:08 21 MR. JUPITER: Good afternoon, Your Honor.

14:54:09 22 THE COURT: Good afternoon.

14:54:10 23 ARGUMENT BY THE DEFENDANT

14:54:10 24 MR. JUPITER: Your Honor, I wasn't sure where  
14:54:14 25 the Court wanted to focus on today. So if the Court --

14:54:19 1 I did prepare, just in case we needed to go through the  
14:54:24 2 various attachments that I think most strongly support  
14:54:28 3 our argument, I did -- what I did was I renumbered them,  
14:54:35 4 including two of the government's exhibits, just for the  
14:54:38 5 purposes of this, my argument. And I gave a copy of  
14:54:43 6 that binder to the government and I can give a copy to  
14:54:46 7 the Court.

14:54:48 8 I think the Court is actually going in a little bit  
14:54:51 9 different direction, and I can address that. But if we  
14:54:52 10 do get into --

14:54:53 11 THE COURT: You have a courtesy copy for the  
14:54:55 12 Court?

14:54:56 13 MR. JUPITER: Yes.

14:54:57 14 THE COURT: Okay. You can come up.

14:55:24 15 MR. JUPITER: I want to focus the Court on the  
14:55:26 16 fact that this is a case where the government is  
14:55:28 17 charging a scheme to defraud, a scheme to defraud,  
14:55:33 18 saying that Mr. James started a scheme to defraud --

14:55:37 19 THE COURT: Well, there are -- as I recall,  
14:55:39 20 there are two wire fraud charges, Counts 1 and 2, and  
14:55:42 21 then there's program fraud, 666, is Count 3, correct?

14:55:46 22 MR. JUPITER: Right.

14:55:47 23 THE COURT: Okay. And at the nub of these, of  
14:55:49 24 course, a wire has to be involved. But at the nub it is  
14:55:53 25 alleging, I believe, at least three different types of

14:55:57 1 criminal conduct.

14:55:58 2 One is billing for expenses before Mr. James was  
14:56:07 3 Senator James. One was double-billing. And the other  
14:56:14 4 is converting to personal use funds that should have  
14:56:18 5 gone to the Danish National Archives. A portion of the  
14:56:21 6 funding did go to the Danish National Archives and a  
14:56:26 7 portion did not, and the objectionable conduct that is  
14:56:28 8 charged is the portion that didn't.

14:56:30 9 Is that your sense of what -- is that the core of  
14:56:34 10 the indictment as to the criminal conduct?

14:56:38 11 MR. JUPITER: That is the -- the Court has  
14:56:40 12 identified the manner and means, I think. And, yes, I  
14:56:46 13 agree with the Court that --

14:56:48 14 THE COURT: Okay.

14:56:49 15 MR. JUPITER: -- that those are the ways that  
14:56:50 16 the government is saying the scheme to defraud was  
14:56:53 17 carried out.

14:56:53 18 But it's -- what I wanted to emphasize was that the  
14:56:58 19 scheme to defraud, itself, which I think distinguishes  
14:57:03 20 this from the cases that the government cites, the  
14:57:07 21 scheme to defraud itself was towards legislative acts.

14:57:11 22 And that scheme to defraud was saying that  
14:57:14 23 Mr. James started out a scheme in April of 2009 that was  
14:57:23 24 designed, not to fool his constituents, not to fool  
14:57:28 25 someone outside of the legislature but using the

14:57:32 1 legislative process itself.

14:57:34 2 Consequently --

14:57:36 3 THE COURT: Well, before you get there, you  
14:57:42 4 don't dispute that if you try to get compensation for  
14:57:48 5 acts undertaken before becoming a public official, and  
14:57:54 6 getting public funds to pay for that, that there's at  
14:58:00 7 least arguably a, some criminal conduct that is the  
14:58:04 8 sub- -- that could be the subject of an indictment.

14:58:09 9 MR. JUPITER: It could be the subject of an  
14:58:11 10 indictment, certainly.

14:58:12 11 THE COURT: Okay. Let me ask the question more  
14:58:14 12 precisely, then.

14:58:16 13 Do you dispute that seeking compensation for  
14:58:23 14 expenses incurred before a legislator is a legislator is  
14:58:28 15 outside of the scope of the Speech or Debate Clause?

14:58:37 16 MR. JUPITER: I think for that broad statement,  
14:58:38 17 I think that it, especially in this case, it can be.  
14:58:44 18 For the specific --

14:58:45 19 THE COURT: Just so -- I want to be very clear.  
14:58:47 20 You're saying that it is outside of the Speech or Debate  
14:58:50 21 Clause? There's no Speech or Debate Clause protection?

14:58:53 22 MR. JUPITER: No, no, no. There's Speech and  
14:58:56 23 Debate Clause protection.

14:58:57 24 THE COURT: For --

14:58:59 25 MR. JUPITER: Okay. Now --

14:59:00 1 THE COURT: -- seeking funds for expenses  
14:59:01 2 incurred before a legislator is a legislator.

14:59:11 3 Because I'm looking at the acts that are at the  
14:59:13 4 core here and that are mentioned in the indictment. And  
14:59:17 5 one of them is, I think, that Mr. James sought  
14:59:24 6 compensation for expenses incurred before he was a  
14:59:29 7 senator. Is that your understanding, that's what's  
14:59:33 8 alleged.

14:59:33 9 MR. JUPITER: And I think I can answer that  
14:59:35 10 directly, Your Honor.

14:59:36 11 THE COURT: And my question, to make it more  
14:59:38 12 general, is just whether that conduct that occurs before  
14:59:43 13 a legislator is a legislator is within the protection of  
14:59:46 14 the Speech or Debate Clause?

14:59:49 15 MR. JUPITER: No, no.

14:59:50 16 THE COURT: Okay.

14:59:51 17 MR. JUPITER: Okay. And that's why I wanted to  
14:59:52 18 make sure, this scheme to defraud starts while he -- the  
14:59:56 19 scheme to defraud identified in the indictment says  
14:59:59 20 beginning at or near April 9th, 2009, while he was a  
15:00:04 21 senator.

15:00:05 22 He is not being charged for acts that occurred  
15:00:09 23 before he was a senator. In fact, he's not being, he's  
15:00:13 24 not being charged with making an agreement with private  
15:00:16 25 parties before he was a senator.

15:00:17 1 He's not being charged with investigating with --  
15:00:21 2 like there was something criminal about him doing his  
15:00:23 3 research as a private historian before he was a senator.  
15:00:28 4 There's nothing wrong with him coming up with an  
15:00:31 5 agreement.

15:00:32 6 Those -- none of those acts they're saying are  
15:00:34 7 criminal. They're saying that this scheme to defraud  
15:00:37 8 started April 9th, 2009, and that Mr. James, in April  
15:00:42 9 of -- in April of 2009 came up with this scheme that,  
15:00:47 10 "I'm going to get money from the legislature."

15:00:50 11 And it's very clear from our attachments, in terms  
15:00:55 12 of what the scheme was. And I think it's even clear  
15:00:59 13 from the indictment.

15:01:01 14 And the government concedes it is all related to  
15:01:06 15 legislative acts. From the beginning, in April of 2009,  
15:01:12 16 to him contacting the -- and I want to make sure I'm not  
15:01:19 17 muddying up the record. But what the government seeks  
15:01:24 18 to -- if you look in the folder, Government's Exhibit  
15:01:27 19 Number 12, I read number -- for purposes of this  
15:01:29 20 hearing, our Exhibit Number 1 --

15:01:31 21 THE COURT: Am I to understand that you're  
15:01:33 22 saying that the scheme or artifice to defraud begins at  
15:01:38 23 a point when Mr. James was a senator?

15:01:43 24 MR. JUPITER: Exactly.

15:01:44 25 THE COURT: And so your theory is that the

15:01:46 1 government is charging conduct that is at a time when he  
15:01:52 2 was a senator, and arguably someone who could benefit  
15:01:56 3 from the protection of the Speech or Debate Clause?

15:01:59 4 MR. JUPITER: No question.

15:02:00 5 THE COURT: Okay. So then, are you saying that  
15:02:02 6 the government cannot reconcile that with paragraph 11,  
15:02:10 7 for instance, which refers to conduct that predates  
15:02:18 8 Mr. James becoming a senator?

15:02:20 9 That is, it alleges James submitted an invoice for  
15:02:23 10 translation work that was completed before his election  
15:02:27 11 to the legislature, and James received legislature funds  
15:02:30 12 for payment of the invoice.

15:02:33 13 MR. JUPITER: So their proof is --

15:02:35 14 THE COURT: Well, my question is a yes or no.  
15:02:37 15 Are you saying that the government cannot reconcile  
15:02:39 16 that?

15:02:39 17 Can they reconcile that or cannot reconcile that.

15:02:43 18 MR. JUPITER: I'm a little \*lost on what you  
15:02:45 19 mean by "reconcile."

15:02:46 20 THE COURT: Is there --

15:02:47 21 MR. JUPITER: They're not saying it was -- the  
15:02:49 22 criminal behavior occurred before he was a senator.  
15:02:53 23 They're saying that because he, because this was some --  
15:03:00 24 these were services that were done before he was a  
15:03:04 25 senator, when he asked for the money, that at that

15:03:08 1 particular time it became criminal. His asking for the  
15:03:12 2 money was --

15:03:12 3 THE COURT: Are you suggesting -- am I to  
15:03:14 4 understand you're suggesting there's something logically  
15:03:17 5 inconsistent here?

15:03:19 6 Because there is arguably criminal conduct that  
15:03:24 7 preceded the charged time. That is --

15:03:27 8 MR. JUPITER: I disagree with the Court's --

15:03:28 9 THE COURT: I'm just asking a question. I'm  
15:03:30 10 trying to understand -- okay. Let me ask you this: Is  
15:03:32 11 the government not charging at paragraph 11, for  
15:03:36 12 example, that as a senator -- which is the only time  
15:03:40 13 when he could get government funds -- that he tried to  
15:03:43 14 get government funds for things which he could not  
15:03:48 15 receive government funds, that is, expenses incurred  
15:03:53 16 before he was a senator?

15:03:58 17 MR. JUPITER: Yes.

15:03:59 18 THE COURT: Okay. Why would that not be  
15:04:01 19 conduct -- why isn't that conduct that is outside the  
15:04:06 20 protection of the Speech or Debate Clause?

15:04:10 21 MR. JUPITER: Because the criminal conduct,  
15:04:12 22 they're saying that the conduct that's criminal is the  
15:04:15 23 conduct that occurred in his request for funds, not in  
15:04:23 24 his -- they're not saying that at the time that  
15:04:26 25 Mr. James had these services done, according to their



15:04:30 1 theory, that it was criminal for him to have a book  
15:04:33 2 translated. They're saying it was criminal for him to,  
15:04:40 3 it was criminal for him to come up with this scheme to  
15:04:44 4 defraud to pay for that service.

15:04:48 5 And the question then turns upon whether or not,  
15:04:53 6 when Mr. James is trying to get legislation passed and  
15:04:56 7 trying to prepare for a, for his committee meeting and  
15:05:02 8 obtain materials for that, whether or not it was proper  
15:05:05 9 for him, in committing those legislative acts -- which I  
15:05:08 10 think are clearly legislative acts when he committed  
15:05:11 11 those legislative actions, when he went, sought to  
15:05:15 12 secure this material that he needed to prepare for the  
15:05:18 13 subcommittee -- the committee hearing, when he sought to  
15:05:22 14 draft this legislation, when he did all of these  
15:05:25 15 legislative actions, were those legislative actions at  
15:05:29 16 that time criminal?

15:05:31 17 They're not alleging that in 2006 or 2007 that he  
15:05:34 18 had this scheme, like, "Oh, I'm going to be senator in a  
15:05:37 19 couple years. So what I'm going to do is I'm going  
15:05:40 20 to" -- that's not their theory. Their theory is that  
15:05:42 21 his scheme started in 2009.

15:05:44 22 THE COURT: Is the government not charging  
15:05:46 23 something along these lines -- let's assume for the sake  
15:05:49 24 of argument you have a flat tire and you incur an  
15:05:54 25 expense for a new tire two years before you become a

15:06:00 1 legislator. And then you become a legislator. And  
15:06:03 2 while a legislator, you submit an invoice to get money  
15:06:07 3 for that replacement tire.

15:06:10 4 Are you suggesting that that is protected by the  
15:06:14 5 Speech or Debate Clause?

15:06:17 6 That is, the undertaking to try to get the payment  
15:06:22 7 for that tire that you paid for, or that the expense  
15:06:26 8 that was incurred before the person was a legislator.

15:06:30 9 MR. JUPITER: In the case of a flat tire I  
15:06:32 10 think is highly unlikely. But I think if you're  
15:06:35 11 drafting legislation to get your tire fixed, it possibly  
15:06:39 12 could.

15:06:41 13 In terms of whether or not the government can  
15:06:43 14 allege, in terms of whether or not, you know, it's  
15:06:48 15 possible, I doubt it. I think that's, you know, that  
15:06:50 16 would be hard to say, that that would be inextricably  
15:06:55 17 tied to any kind of legislative process.

15:06:57 18 But the scheme specifically here is that his scheme  
15:07:01 19 to defraud was to use the legislative process. Calling  
15:07:05 20 on him to defend whether or not what he did to prepare  
15:07:10 21 for the committee meetings, to prepare to get this bill  
15:07:14 22 drafted, to sway his fellow senators, and the debate  
15:07:21 23 that took place and the speeches he made, to do all of  
15:07:25 24 that, whether or not his actions, his request, while he  
15:07:30 25 was a senator, he has to defend and say these were

15:07:33 1 legitimate. And that's exactly what the Speech and  
15:07:36 2 Debate Clause prohibits.

15:07:37 3 THE COURT: Okay. Am I to understand you to  
15:07:38 4 say, then, that as part and parcel of his legislative  
15:07:42 5 activities, seeking compensation for certain expenses,  
15:07:47 6 you're saying that is part and parcel of the protected  
15:07:51 7 legislative activity?

15:07:55 8 MR. JUPITER: I hate to make a broad statement  
15:07:57 9 like that. What I would say was that we --

15:07:59 10 THE COURT: Well, answer my question first,  
15:08:01 11 then you can explain.

15:08:09 12 MR. JUPITER: Requesting funds, in themselves,  
15:08:12 13 is not a legislative activity.

15:08:14 14 THE COURT: Okay.

15:08:15 15 MR. JUPITER: Requesting, requesting funding  
15:08:19 16 for, to obtain, in this case, the materials and then  
15:08:23 17 doing the, in the process of preparing for drafting  
15:08:28 18 legislation, and also when you have the, the express  
15:08:34 19 purpose of debating and preparing for the committee  
15:08:39 20 meeting, the committee hearings, public hearings that  
15:08:42 21 Mr. James specifically did, and makes reference to,  
15:08:48 22 those are.

15:08:48 23 THE COURT: Now, to the extent the government's  
15:08:50 24 allegation is cabined in a way so that it charges that  
15:08:58 25 Mr. James, for example, is seeking compensation for a

15:09:03 1 translation that occurred and that was completed before  
15:09:06 2 he was a senator, are you saying that that effort to get  
15:09:15 3 compensation or the expensing or invoicing of that  
15:09:22 4 expense is something that is protected?

15:09:24 5 MR. JUPITER: In this, it is protected.

15:09:27 6 Specifically when you look at the fact that the  
15:09:34 7 legislation itself related to payment for the  
15:09:38 8 acquisition as well as translation of documents, the  
15:09:43 9 acquisition and translation of all of these original  
15:09:47 10 records, as well as documents related to Fireburn.

15:09:52 11 THE COURT: We're just looking at paragraph 11.  
15:09:54 12 It says, "James submitted an invoice for translation  
15:09:56 13 work that was completed before his election to the  
15:10:01 14 legislature, and James received legislature funds for  
15:10:05 15 payment of the invoice."

15:10:07 16 So if I were to use my example, again, just for  
15:10:13 17 ease of reference, James submitted an invoice for a  
15:10:16 18 replacement tire that was replaced before he was a  
15:10:21 19 senator, and received funds for that replacement tire --  
15:10:25 20 I know it's not drafting legislation, but it's for  
15:10:30 21 completed work that occurred before his entry into the  
15:10:33 22 legislature.

15:10:36 23 Are you saying that that receives the benefit of  
15:10:40 24 the Speech or Debate Clause; one, the effort to receive  
15:10:45 25 the funding and, two, the act in itself, that is, having

15:10:51 1 something completed before being a member of the  
15:10:53 2 legislature?

15:10:54 3 MR. JUPITER: Okay. So the act itself of  
15:10:57 4 having something completed before being in the  
15:11:01 5 legislature, that's not --

15:11:01 6 THE COURT: That's not protected, correct?

15:11:05 7 MR. JUPITER: Well, that's not criminal  
15:11:06 8 activity.

15:11:06 9 THE COURT: Well, my question is -- the  
15:11:07 10 question here is really, is it entitled to protection by  
15:11:11 11 the Speech or Debate Clause. And my question is, is it?

15:11:16 12 MR. JUPITER: That --

15:11:16 13 THE COURT: It's a yes or no.

15:11:18 14 MR. JUPITER: No. In terms of whether or not,  
15:11:20 15 for instance, we're sitting in trial and asking, is that  
15:11:26 16 protected? No.

15:11:29 17 It is something that occurred outside the  
15:11:31 18 legislative process. Is that protected? No.

15:11:35 19 The question is, is whether someone, a senator, has  
15:11:37 20 to defend against whether or not the payment for a  
15:11:42 21 document that he uses, he, whether or not he has to  
15:11:49 22 defend in court his acquisition of that document.

15:11:55 23 Now, what the government is alleging is --

15:11:57 24 THE COURT: As I understand it, though, on its  
15:12:01 25 face, though, the indictment says it's for the, an

15:12:05 1 invoice for translation work, not for receiving, not for  
15:12:08 2 a copy of that work, but for the translation work  
15:12:12 3 itself.

15:12:13 4 If that's what it alleges on its face, am I not  
15:12:16 5 required to look at that and then assess based on what's  
15:12:20 6 on the face of the indictment?

15:12:21 7 MR. JUPITER: In terms of whether or not it's  
15:12:23 8 criminal for him to pay for it, for the legislature to  
15:12:31 9 inquire. And so --

15:12:32 10 THE COURT: Isn't the inquiry, though, whether  
15:12:34 11 it is a legislative act?

15:12:36 12 MR. JUPITER: That's exactly -- and that's  
15:12:38 13 exactly what --

15:12:39 14 THE COURT: And if it is a legislative act,  
15:12:41 15 then arguably it might be entitled to protection by the  
15:12:47 16 Speech or Debate Clause. But as I understand you, what  
15:12:50 17 it sounds like you're saying, it is not a legislative  
15:12:51 18 act, in which case we don't even reach the --

15:12:55 19 MR. JUPITER: I was very careful to  
15:12:57 20 distinguish. Because the act- -- you're asking me to  
15:12:59 21 distinguish between whether or not, whether or not the  
15:13:04 22 activity -- regarding the activity that predated him  
15:13:08 23 being a legislator is protected.

15:13:10 24 That activity is not protected. What's protected  
15:13:15 25 is whether or not it was proper for him to pay for

15:13:20 1 something that he, something that he used to acquire --

15:13:25 2 THE COURT: I'm going to put up the indictment.

15:13:29 3 Do you have the indictment there, Attorney Jupiter?

15:13:35 4 Because as I understand it, the Court's inquiry  
15:13:38 5 necessarily requires that I look at the indictment,  
15:13:41 6 correct?

15:13:46 7 MR. JUPITER: Yes, Your Honor.

15:13:47 8 THE COURT: Okay.

15:14:10 9 MR. JUPITER: Here it is.

15:14:11 10 THE COURT: Okay. If you can put it on the  
15:14:12 11 Elmo. If you can put it on the Elmo, paragraphs 8, 9,  
15:14:17 12 10, 11.

15:14:59 13 Okay. Is it -- am I to understand that converting  
15:15:03 14 a portion of funds received from the legislature, is  
15:15:08 15 that a legislative act?

15:15:15 16 MR. JUPITER: Appropriating legislative funds?

15:15:19 17 THE COURT: Well, we'll go to the indictment.  
15:15:20 18 I'm just asking generally, is converting legislative  
15:15:24 19 funds to your personal use, is that a legislative act?

15:15:26 20 MR. JUPITER: No.

15:15:27 21 THE COURT: Okay. Now looking at the  
15:15:28 22 indictment at paragraph 8, it seems to allege that James  
15:15:33 23 obtained cash advances for payment to Danish National  
15:15:38 24 Archives, and that a portion of it was converted for  
15:15:41 25 personal use.

15:15:44 1 To the extent that the wire fraud counts go to that  
15:15:49 2 type of activity, that is, converting to personal use  
15:15:53 3 government funds, is that conduct that is legislative,  
15:15:59 4 the conversion to the personal use?

15:16:02 5 MR. JUPITER: The conversion to the personal  
15:16:03 6 use is not legislative.

15:16:06 7 THE COURT: To the extent the government is, or  
15:16:10 8 paragraph 8 is read to charge that type of conduct as  
15:16:15 9 objectionable, tell me, what is the legislative act that  
15:16:21 10 is to be gleaned from paragraph 8?

15:16:28 11 MR. JUPITER: The legislative act is his  
15:16:32 12 transferring the, to effect the transfers to Denmark on  
15:16:43 13 behalf of the legislature -- well, no, I'm sorry -- is  
15:16:50 14 obtaining cash advances from the legislature to effect  
15:16:54 15 the transfer to Denmark on behalf of the legislature.  
15:17:02 16 And I don't think you just look at the indictment here,  
15:17:05 17 but you look specifically at, you -- this is  
15:17:09 18 incorporating what they say the, the scheme to defraud  
15:17:14 19 was.

15:17:15 20 The scheme to defraud was him telling the  
15:17:18 21 legislature, "I'm doing this for legislation." I don't  
15:17:26 22 think you isolate the paragraphs from each other.

15:17:32 23 So --

15:17:34 24 THE COURT: Okay. And let's go to paragraph 9,  
15:17:36 25 if you will. That alleges that Mr. James double-billed



15:17:43 1 the legislature for expenses. And then it alleges, as I  
15:17:51 2 understand it, that he received funds and then he -- for  
15:17:54 3 a certain purpose, and then he obtained funds for the  
15:18:00 4 very same purpose.

15:18:01 5 Is the, is obtaining cash for something that has  
15:18:07 6 already been compensated, is that a legislative act?

15:18:16 7 MR. JUPITER: It is a legislative act if --

15:18:19 8 THE COURT: So you're saying the receipt of  
15:18:20 9 cash, in itself, is a legislative act?

15:18:24 10 MR. JUPITER: I did not say in and of itself.

15:18:27 11 THE COURT: Okay.

15:18:29 12 MR. JUPITER: I say -- what I said, if it is  
15:18:32 13 done for the purposes of legislation. I don't, I  
15:18:40 14 believe the case law is clear that the Court can look --

15:18:43 15 THE COURT: What authority is there for that,  
15:18:45 16 that -- is it -- you're saying that as charged in the  
15:18:49 17 indictment, this is for the purpose of legislation?

15:18:54 18 I'm, I'm asking about the portion that, I believe,  
15:18:58 19 paragraph 9 focuses on, which is the second hyphenated  
15:19:04 20 word, which is double-billed. Is the  
15:19:09 21 doubling-billing --

15:19:09 22 MR. JUPITER: No criminal act, in and of  
15:19:11 23 itself, is legislative. I would -- well, I can't even  
15:19:14 24 say, go that far. But I would say that usually, yeah,  
15:19:22 25 under, if you're talking about a specific criminal act

15:19:26 1 in isolation, you know, most of the cases we found is  
15:19:30 2 there's probably going to be a finding -- I can't say in  
15:19:33 3 every one, because some criminal acts are -- I think the  
15:19:36 4 cases make clear that you're going to have some things  
15:19:39 5 that are going to end up being covered, some possibly  
15:19:46 6 criminal acts that may end up being subject to the  
15:19:50 7 Speech or Debate Clause.

15:19:52 8 The cases specifically say that there's, this  
15:19:56 9 clause will make it more difficult for the government to  
15:19:58 10 prove their cases. But that's not the point of inquiry.  
15:20:02 11 The point of inquiry doesn't end when you say: Okay, we  
15:20:06 12 take this one act and it's criminal in and of itself.  
15:20:09 13 You take this one act and it's criminal in and of  
15:20:13 14 itself.

15:20:13 15 THE COURT: You keep saying that. My question  
15:20:15 16 was, I was asking if it's legislative. That's what I'm  
15:20:18 17 asking you. You know, I want to know if the  
15:20:21 18 double-billing in and of itself is something that is  
15:20:23 19 legislative and entitled to protection by the Speech or  
15:20:29 20 Debate Clause.

15:20:29 21 MR. JUPITER: In and of itself, no.

15:20:30 22 THE COURT: Okay. And then in context here  
15:20:32 23 you're saying that a double- -- that an allegation of  
15:20:34 24 double-billing is a legislative act, in context here?

15:20:39 25 MR. JUPITER: In context here, double-billing

15:20:43 1 for the purposes of obtaining material for material to  
15:20:47 2 draft legislation, obtaining material to prepare for a  
15:20:53 3 senate hearing is going to be covered by a, is going --  
15:21:00 4 if it's directly related to, and is an integral part of  
15:21:06 5 the legislative process, then it is covered by the  
15:21:09 6 Speech or Debate Clause.

15:21:10 7 THE COURT: Okay. Let me ask you to focus on  
15:21:14 8 paragraph 10 for the moment. And that is submitting an  
15:21:19 9 invoice and receiving funds for something that was not  
15:21:28 10 done.

15:21:28 11 Is that -- stepping away from the indictment, is  
15:21:34 12 submitting an invoice and receiving funds for something  
15:21:37 13 that was not done, is that a legislative act or not?

15:21:43 14 MR. JUPITER: Submitting an invoice for, if it  
15:21:48 15 is -- I think the inquiry is whether or not it was  
15:21:50 16 submitted for purposes of legislation.

15:21:54 17 THE COURT: Okay.

15:21:54 18 MR. JUPITER: In and of itself, submitting an  
15:21:56 19 invoice for research and translation work, in and of  
15:21:59 20 itself, in a vacuum, we could never say that -- I mean,  
15:22:02 21 I don't know how anyone can say that that's legislative.  
15:22:08 22 But I --

15:22:08 23 THE COURT: Tell me -- I guess -- I think your  
15:22:11 24 position might be, then, that you're saying in context  
15:22:14 25 here on the face of the indictment that what is alleged

15:22:17 1 is something that is arguably legislative, then?

15:22:23 2 MR. JUPITER: I think because of the -- my  
15:22:25 3 position is that because of the first part, that it's  
15:22:29 4 manifestly legislative.

15:22:31 5 THE COURT: When you say "the first part," tell  
15:22:33 6 me what is the first.

15:22:40 7 3MR. JUPITER: Particularly, I'll just go  
15:22:41 8 straight to paragraph 4: "While Senator James  
15:22:48 9 proposed" -- and that word "proposed" is important.  
15:22:52 10 Now, they don't say "James proposed through  
15:22:56 11 legislation," but how does a senator propose?

15:22:59 12 "While Senator James proposed using legislature  
15:23:04 13 funds to obtain historical documents related to the  
15:23:09 14 Fireburn from Danish National Archives located in  
15:23:14 15 Denmark."

15:23:15 16 These are the general allegations. James proposed  
15:23:20 17 using legislative funds to obtain, translate, and  
15:23:25 18 distribute copies of the documents to institutions in  
15:23:30 19 the US Virgin Islands.

15:23:33 20 All of the paragraphs that the Court refers to are  
15:23:36 21 premised on this. And if we have any question as to  
15:23:45 22 what is meant by "proposed," then we go to what actually  
15:23:50 23 he was doing and what actually is being referred to  
15:23:55 24 while he's a senator in April.

15:23:57 25 And that's where we get to the documents that show

15:24:00 1 he was drafting legislation that is completely  
15:24:03 2 consistent with the grand jury testimony that was  
15:24:06 3 elicited by the government, that's completely consistent  
15:24:11 4 with the time period that the government refers to in  
15:24:13 5 the indictment, that was obtained from this grand jury  
15:24:17 6 that heard that testimony --

15:24:19 7 THE COURT: Well, I'm going to get to the grand  
15:24:21 8 jury testimony in a moment, but just for the moment I  
15:24:24 9 wanted to focus on paragraph 10.

15:24:26 10 You're saying that when you look at paragraph 4,  
15:24:30 11 "Future proposed conduct," you're saying that future  
15:24:34 12 proposed conduct in conjunction with the submission of  
15:24:37 13 an invoice for something that was never done is  
15:24:41 14 legislative activity?

15:24:46 15 Because you're saying paragraph 4 is the one that  
15:24:48 16 says, is proposing something, right? And you said look  
15:24:51 17 at it in context. I'm trying to get a sense of the  
15:24:54 18 context you're trying to establish.

15:24:56 19 Am I to understand that a proposal, or proposed use  
15:25:06 20 of funding, which would be a future thing, in  
15:25:11 21 conjunction with the actual submission of an invoice for  
15:25:15 22 work that was never done, is legislative activity?

15:25:18 23 MR. JUPITER: Yeah. That scheme to -- the  
15:25:21 24 scheme to defraud is a legislative scheme, yes, Your  
15:25:24 25 Honor. The proposed -- they're saying this is how he

15:25:26 1 carried out his scheme. And the scheme is a, is clearly  
15:25:31 2 a scheme that involves -- that directly goes to  
15:25:36 3 legislation -- how was he going to justify getting the  
15:25:39 4 funds? "I'm going to draft legislation. I'm going to  
15:25:42 5 have committee, hearing meetings. I'm going to get this  
15:25:45 6 material. I'm going to debate it on the floor."

15:25:47 7 There's an amendment that talks about, the  
15:25:51 8 amendment to the bill that didn't get out, initially get  
15:25:54 9 out of committee. It was amended how? By saying that  
15:25:57 10 there would be an educational component that would  
15:26:00 11 include the dissemination of these materials that I'm  
15:26:02 12 obtaining. They're not saying he didn't obtain any of  
15:26:06 13 these materials.

15:26:07 14 THE COURT: Let me see if --

15:26:08 15 MR. JUPITER: All of this goes directly to the  
15:26:10 16 scheme to defraud is a scheme to get legislation passed.

15:26:16 17 THE COURT: Okay. And then if you can just  
15:26:19 18 focus on 11, paragraph 11 for a moment. I think I  
15:26:22 19 started out asking questions about that before I  
15:26:24 20 actually went to the indictment.

15:26:26 21 Paragraph 11 says that, "James submitted an invoice  
15:26:30 22 for translation work that was completed before his  
15:26:33 23 election to the legislature, and James received  
15:26:37 24 legislature funds for payment of this invoice."

15:26:49 25 And again in context with what is proposed in

15:26:52 1 paragraph 4, or at any point above paragraph --  
15:26:57 2 paragraphs 8, 9, 10 and 11, are you suggesting that  
15:27:04 3 proposing using legislative funds, and then actually  
15:27:08 4 submitting an invoice for work that was done, a  
15:27:11 5 translation was done before Mr. James became a senator,  
15:27:16 6 and receiving funds while he is a senator for work that  
15:27:20 7 was done and completed before his election, am I to  
15:27:25 8 understand that that is legislative activity?

15:27:30 9 MR. JUPITER: In this context, yes, when it is  
15:27:34 10 done for the --

15:27:35 11 THE COURT: Okay.

15:27:35 12 MR. JUPITER: When it is done, when it is a  
15:27:37 13 part of the integral legislative process.

15:27:44 14 THE COURT: All right. Let me hear you on the  
15:27:46 15 grand jury transcript.

15:27:47 16 As I understand, your position is that the  
15:27:53 17 testimony during the grand jury included violations of  
15:27:59 18 the Speech or Debate Clause, and that those violations  
15:28:03 19 so permeated the grand jury that it warrants dismissal  
15:28:09 20 in the manner that the Third Circuit said was  
15:28:11 21 appropriate in Helstoski.

15:28:14 22 Is that your argument?

15:28:16 23 MR. JUPITER: That's one of the arguments, yes,  
15:28:18 24 Your Honor.

15:28:18 25 THE COURT: Okay. So tell me, what is it that

15:28:23 1 is objectionable in the grand jury?

15:28:27 2 Because as I understood it you submitted the  
15:28:30 3 transcript of a witness who, I think the Court pointed  
15:28:34 4 out for the government, at one point that witness speaks  
15:28:37 5 of educational programs or undertaking. And I think it  
15:28:48 6 was preceded by a question: What did Senator James  
15:28:53 7 propose to do during his term of office?

15:29:02 8 MR. JUPITER: So this is -- I have it as a,  
15:29:08 9 page 21 that's filed under seal, as one of our exhibits.  
15:29:22 10 And the Court -- there's the question the first time by  
15:29:26 11 the government. And the answer related to Fireburn. He  
15:29:30 12 wanted to use -- first of all, when the Danes left in  
15:29:34 13 1917, they took all the records, the Danish records back  
15:29:37 14 to Copenhagen, Denmark.

15:29:39 15 And there's a discussion that follows. I won't go  
15:29:43 16 through all of it --

15:29:43 17 THE COURT: Speak right into the microphone so  
15:29:46 18 we can hear you.

15:29:48 19 MR. JUPITER: There's a discussion that follows  
15:29:51 20 for several pages. And page 22, with, right after,  
15:30:00 21 there's a -- the witness says, and as the chair of the  
15:30:03 22 committee -- "as chair of the committee on education,  
15:30:06 23 youth and culture, this was significant."

15:30:09 24 Another question: "What did James propose to do  
15:30:13 25 during his tenure in the senate related to Fireburn?"



15:30:18 1 "To use the information to draft legislation --  
15:30:22 2 rather, through recognition of Fireburn to use the  
15:30:26 3 legislation to draft" -- it says "craft" but I believe  
15:30:30 4 it's "draft legislation dealing with the commission, the  
15:30:33 5 centennial commission."

15:30:34 6 Another question: "Okay. Did Senator James  
15:30:37 7 propose to obtain documents from Denmark related to  
15:30:41 8 Fireburn?"

15:30:42 9 "It was not -- the short answer is yes."

15:30:44 10 "And how did he propose to do that?"

15:30:48 11 This was very important to the government's case  
15:30:51 12 because they wanted to establish that this was not a  
15:30:53 13 scheme to defraud that just started in 2010. They  
15:30:59 14 wanted to relate events that went all the way back to  
15:31:03 15 2009.

15:31:05 16 The witness is giving the government information  
15:31:09 17 about the legislative process, what he propose to do,  
15:31:13 18 how he was going to do it, how he did it; photocopying  
15:31:19 19 the documents.

15:31:21 20 Goes on, page 23: How did he get the money? How  
15:31:28 21 he traveled to Denmark, that's related to that. How did  
15:31:33 22 it come out of his budget? They keep going for several  
15:31:41 23 pages about the documents.

15:31:44 24 Page 25, when they -- and I think it's when the --  
15:31:51 25 "But when the documents arrived in St. Croix, were they

15:31:53 1 in Danish or English or both?"

15:31:56 2 "They were in both. They had already been  
15:31:59 3 translated."

15:32:04 4 It goes on for several pages, Your Honor. And it  
15:32:08 5 was obviously important that the government wanted the  
15:32:12 6 grand jury to hear about how Mr. James was going to  
15:32:19 7 effectuate this legislation.

15:32:25 8 And for the government now to say: Well, the  
15:32:29 9 witness was inconsistent, well, they didn't point that  
15:32:32 10 out to the grand jury, they didn't say, "oh, Grand jury,  
15:32:35 11 don't believe this witness," I didn't see anything in  
15:32:37 12 the record that says that. They were trying to elicit  
15:32:39 13 more and more information to substantiate the fact that  
15:32:42 14 Mr. James's purported, or what they would characterize  
15:32:46 15 as his purported efforts to get legislation passed was a  
15:32:55 16 fraud.

15:32:57 17 THE COURT: Okay. Now, why is it that the  
15:33:00 18 discussion here -- I think I had referred to page 10.  
15:33:02 19 And you're correct, it's actually pages 21 through 26.  
15:33:07 20 Then I think there's some discussion on 31 to 33, and  
15:33:15 21 that's more about the procedures involving the payment  
15:33:17 22 of funds to the Fireburn project.

15:33:21 23 But focusing on 21 through 26, is it your sense,  
15:33:26 24 assuming that some or all of that is objectionable, for  
15:33:31 25 Speech or Debate Clause purposes, that it so permeates

15:33:35 1 the grand jury process?

15:33:39 2 MR. JUPITER: It, it is. But more so it puts  
15:33:42 3 everything, puts everything else in context as to what  
15:33:46 4 the government's investigation was about.

15:33:50 5 THE COURT: Assuming for the sake of argument  
15:33:53 6 that it doesn't so permeate, but that it is  
15:33:57 7 objectionable, what's the remedy?

15:34:00 8 That is, if it so permeates then the Helstoski  
15:34:05 9 result is required, correct? Dismissal?

15:34:07 10 MR. JUPITER: Yes, Your Honor.

15:34:08 11 THE COURT: But if it isn't -- if I were to  
15:34:09 12 conclude, arguably, this is objectionable, you know, you  
15:34:12 13 didn't need to go into this in order to prove your case  
15:34:17 14 or to develop a record to return an indictment, isn't  
15:34:24 15 there a remedy short of dismissal, if this isn't  
15:34:29 16 information that is, that is properly brought before the  
15:34:35 17 grand jury?

15:34:37 18 MR. JUPITER: The Court -- I believe the Court  
15:34:38 19 would have to take a fruits analysis and see what fruits  
15:34:42 20 were derived --

15:34:44 21 THE COURT: Well, wouldn't it just be an  
15:34:46 22 excision, to the extent it were to have gone afoul?

15:34:58 23 MR. JUPITER: So if the Court were looking for  
15:35:00 24 a remedy short of dismissal, I think that the Court  
15:35:03 25 could require that the government -- any, you know,

15:35:07 1 until the government presents their evidence, we don't  
15:35:11 2 know, we can't really say what evidence is the fruit of  
15:35:16 3 this inquiry.

15:35:20 4 The other thing could be --

15:35:22 5 THE COURT: Is it a use concern that the courts  
15:35:24 6 are concerned with here?

15:35:27 7 That is, should the government -- would the  
15:35:29 8 government just be precluded from using certain things  
15:35:32 9 that are objectionable?

15:35:36 10 MR. JUPITER: That's all I can think of right  
15:35:38 11 now, Your Honor. I would like to think about that a  
15:35:40 12 little more.

15:35:41 13 THE COURT: All right. Now, am I to understand  
15:35:43 14 you, are you saying that the government cannot give a  
15:35:46 15 sense of context with which the crime occurred?

15:35:51 16 That is, for instance, as I understand it, the  
15:35:54 17 government is alleging that a scheme or artifice  
15:35:56 18 unfolded, and the scheme or artifice was to defraud the  
15:36:00 19 legislature and the people of the Virgin Islands of  
15:36:03 20 public funds by submitting double-billing, false  
15:36:06 21 invoices and seeking remuneration for things that had  
15:36:10 22 already been compensated, and to give a sense of  
15:36:16 23 context.

15:36:16 24 Am I to understand that you're saying the  
15:36:18 25 government cannot give a sense of what was in the ether

15:36:28 1 at the time? That is, if --

15:36:30 2 MR. JUPITER: I don't think they can, from the  
15:36:33 3 standpoint of when the crime itself -- so the crime  
15:36:35 4 itself is the, is the legislative act. So that's  
15:36:39 5 what -- I think they relied in their pleadings very  
15:36:43 6 heavily on Brewster. And so in the sense when --  
15:36:49 7 Brewster goes very specifically to the act of bribery,  
15:36:55 8 right, and says it's not, it's not the actions taken in  
15:36:59 9 the execution of the agreement when the bribe is taken,  
15:37:06 10 it's the bribe itself which is outside of the  
15:37:09 11 legislature's sphere.

15:37:10 12 As opposed to here, where the legislative sphere is  
15:37:15 13 the actual scheme that they're saying -- so when -- so  
15:37:19 14 the actual scheme is a legislative scheme. As you're  
15:37:22 15 saying here, "I'm going to commit this crime," according  
15:37:26 16 to them. They're saying --

15:37:27 17 THE COURT: Are you saying there can be a  
15:37:28 18 legislative scheme to defraud that is somehow regarded  
15:37:38 19 as a legislative act?

15:37:42 20 MR. JUPITER: So let's go --

15:37:43 21 THE COURT: My question is a yes or no.

15:37:47 22 MR. JUPITER: Yes.

15:37:49 23 THE COURT: Okay.

15:37:49 24 MR. JUPITER: I had to think a little bit, but  
15:37:51 25 I think so, Your Honor.

15:37:52 1 THE COURT: So a legislator could have a scheme  
15:37:54 2 as part of his legislative activity to do something that  
15:37:57 3 is arguably defrauding the government, but provided that  
15:38:00 4 it's a legislative act or provided it's something that  
15:38:04 5 can be argued to be a legislative act, it could arguably  
15:38:08 6 be protected by the Speech or Debate Clause.

15:38:13 7 MR. JUPITER: Let's go to the extreme to prove  
15:38:16 8 the point and say, what if there's a bill drafted to  
15:38:20 9 commit a criminal act. So, you know, I mean, it's all  
15:38:24 10 out in public in terms of, this is, this is actually in  
15:38:27 11 the legislative, this is in the sphere of legislation.

15:38:31 12 I think that's going -- obviously, it makes no  
15:38:34 13 sense that a legislature would say, "I'm going to  
15:38:36 14 propose a bill to commit a crime."

15:38:38 15 But to prove the point, I think that's completely  
15:38:41 16 within the legislative -- that's completely within the  
15:38:45 17 legislature to be able to deal with those matters. And  
15:38:48 18 that's the whole point, is that all of this was before  
15:38:51 19 the legislature, all of this was done, all of this  
15:38:53 20 scheme that they're saying was to defraud the  
15:38:58 21 legislature itself was, was to, was, is what is being  
15:39:06 22 charged, not something outside of the legislative  
15:39:11 23 sphere.

15:39:15 24 THE COURT: Now, the -- I think I asked you a  
15:39:18 25 question earlier about use. That is, assuming that the

15:39:21 1 Court were to conclude that anything uttered during the  
15:39:26 2 grand jury did not, to the extent it violated the Speech  
15:39:30 3 or Debate Clause, it didn't so permeate the undertaking  
15:39:33 4 of the grand jury such that dismissal isn't warranted.

15:39:44 5 Wouldn't the remedy be, then, to the extent there's  
15:39:46 6 something that's arguably on the cusp there, that the  
15:39:50 7 Court simply be vigilant, since it is a use privilege,  
15:39:54 8 and just make sure that the government doesn't use any  
15:40:00 9 evidence that is objectionable?

15:40:03 10 Isn't that your remedy?

15:40:05 11 MR. JUPITER: I thought that's what I was  
15:40:07 12 saying.

15:40:07 13 THE COURT: Okay.

15:40:07 14 MR. JUPITER: I thought that's what I was  
15:40:08 15 saying. Yes, Your Honor.

15:40:09 16 THE COURT: Okay. Okay.

15:40:10 17 MR. JUPITER: When I said "fruits," I meant the  
15:40:15 18 fruits of their misconduct.

15:40:16 19 THE COURT: Okay. All right. Thank you.

15:40:23 20 Okay. Attorney Vaughn?

15:40:32 21 ARGUMENT BY THE GOVERNMENT

15:40:32 22 MS. VAUGHN: Your Honor, I only have a few  
15:40:34 23 points of response, unless the Court has specific points  
15:40:37 24 you'd like me to address.

15:40:39 25 THE COURT: Okay. Go ahead.

15:40:43 1 MS. VAUGHN: But I think what, the exercise  
15:40:45 2 that the Court just went through with the indictment is  
15:40:47 3 really where the focus has to be under the Speech or  
15:40:52 4 Debate Clause, that paragraph-by-paragraph analysis.

15:40:54 5 And when you do that, it's clear this is a case --  
15:40:58 6 and I can list off several others. This is a case like  
15:41:12 7 Rostenkowski, where the Court affirmed that a  
15:41:15 8 congressman could be tried for misapplying congressional  
15:41:18 9 funds.

15:41:19 10 This is a case like Diggs, where the Court  
15:41:22 11 confirmed a congressman's conviction for misapplying  
15:41:25 12 funds allotted for compensating congressional employees.

15:41:29 13 This is case like Hollander v Clay, where the Court  
15:41:33 14 refused to dismiss a claim against a congressman for  
15:41:36 15 submitting false travel vouchers.

15:41:40 16 THE COURT: Unlike those cases, though, in this  
15:41:42 17 case and in Helstoski, I haven't seen it in another  
15:41:45 18 circuit, the defendant suggests that there is something  
15:41:48 19 going on in the grand jury that triggers a different  
15:41:50 20 analysis, doesn't it?

15:41:52 21 We'll just refer to it as sort of the Helstoski  
15:41:55 22 analysis. Is there -- those other cases, Diggs,  
15:42:01 23 Rostenkowski, I don't recall that those courts went into  
15:42:04 24 the type of drill-down into the grand jury transcript  
15:42:10 25 that Helstoski did, and that is suggested by the defense



15:42:17 1 here.

15:42:18 2 MS. VAUGHN: Well, Your Honor, yes. When the  
15:42:20 3 indictment on its face does not allege any legislative  
15:42:24 4 acts, there really is no reason to look into the grand  
15:42:27 5 jury proceedings, because if the indictment is not  
15:42:31 6 turned on legislative acts, it's not legislative acts  
15:42:33 7 evidence on which the grand jury relied to return that  
15:42:37 8 indictment.

15:42:38 9 And so Helstoski says that, you know, if you  
15:42:42 10 present privileged material to the grand jury, it's only  
15:42:44 11 fatal where the infection cannot be excised. And if  
15:42:47 12 it's not in the indictment in the first place, there's  
15:42:50 13 nothing to excise.

15:42:51 14 The Supreme Court in Johnson said that you can  
15:42:56 15 proceed on an indictment where it's wholly purged of  
15:43:00 16 elements offensive to the Speech or Debate Clause.  
15:43:02 17 Again, there was no --

15:43:03 18 THE COURT: So it's the government's position  
15:43:05 19 that if you lose on the facial review, that is, going  
15:43:08 20 through the indictment, you don't get a Helstoski bite  
15:43:12 21 of the apple?

15:43:14 22 MS. VAUGHN: Yes, Your Honor. Like any other  
15:43:15 23 motion to dismiss, once the -- you typically don't pull  
15:43:18 24 back the curtain and look at the grand jury proceedings  
15:43:22 25 if the indictment is valid on its face.

15:43:26 1 And the Ninth Circuit has actually directly  
15:43:29 2 addressed this, and they've said, clearly, quote, "The  
15:43:32 3 mere fact that some legislative act evidence was  
15:43:34 4 presented to the grand jury cannot entitle the  
15:43:36 5 legislator to dismissal."

15:43:39 6 So where you have a situation like here, where the  
15:43:43 7 indictment on its face does not allege any official  
15:43:47 8 acts, it necessarily --

15:43:49 9 THE COURT: What authority is there that you  
15:43:51 10 have where there was a challenge, both to the face of  
15:43:56 11 the indictment, that is, suggesting that it reached  
15:44:00 12 legislative acts that were protected by the Speech or  
15:44:04 13 Debate Clause, and also there was a challenge to the  
15:44:06 14 undertaking in the grand jury, that is, the evidence  
15:44:10 15 presented to the grand jury that arguably the grand jury  
15:44:15 16 heard evidence that violated the Speech or Debate  
15:44:20 17 Clause?

15:44:20 18 MS. VAUGHN: Your Honor, I'm not actually -- I  
15:44:22 19 can't think of a case off the top of my head where both  
15:44:26 20 of those questions were being addressed.

15:44:27 21 THE COURT: Okay. Go ahead.

15:44:29 22 MS. VAUGHN: I also wanted to clarify that the,  
15:44:34 23 I think Attorney Jupiter said that the government  
15:44:37 24 conceded that these, the allegations were connected to  
15:44:40 25 legislative acts .

15:44:41 1 The government does not concede that. I want to  
15:44:44 2 make sure that's clear for the record. It's the  
15:44:46 3 government's position that none of the conduct alleged  
15:44:48 4 in the indictment is related to any legislative acts.

15:44:57 5 I mean, I think that it's clear if you walk through  
15:44:58 6 the allegations in the indictment, it's important to  
16:08:01 7 stay tethered to those allegations. And at the point  
15:45:04 8 that we're talking about, whether the defendant obtained  
15:45:07 9 documents, what he did with those documents, that's  
15:45:10 10 completely untethered from the allegations in the  
15:45:13 11 indictment, that the defendant submitted invoices and  
15:45:16 12 received money based on invoices and that those invoices  
15:45:19 13 were fraudulent.

15:45:20 14 THE COURT: What's your response to the  
15:45:23 15 defense's position that -- about the scheme or the  
15:45:25 16 artifice -- I think what defense is suggesting is,  
15:45:28 17 pushed to its logical extreme, to the extent there is a  
15:45:31 18 scheme that is undertaken during the course of a  
15:45:35 19 legislator's tenure, that arguably that could be a  
15:45:39 20 legislative act.

15:45:45 21 MS. VAUGHN: There's two parts to the answer.  
15:45:47 22 The first part is Gravel and McDade, both the Supreme  
15:45:50 23 Court and the Third Circuit say just because you do  
15:45:52 24 something while you're a legislature -- legislator  
15:45:54 25 doesn't mean it's a legislative acts. You start from

15:45:57 1 that premise. Even though a legislator takes part in  
15:45:59 2 all sorts of conduct, this is only a subset of that  
15:46:03 3 that's legislative.

15:46:04 4 And then you look at if you're engaging in a scheme  
15:46:06 5 to defraud while you're a legislature -- legislator.

15:46:09 6 So in Lee, for example --

15:46:10 7 THE COURT: But I think, I think that Attorney  
15:46:13 8 Jupiter's point is that to the extent the scheme is,  
15:46:21 9 let's say, for example, made part of legislation that's  
15:46:25 10 being proposed, that arguably then even a scheme can be  
15:46:33 11 legislative protected activity.

15:46:35 12 MS. VAUGHN: In that case, Your Honor, the  
15:46:37 13 scheme would not be protected. The piece of legislation  
15:46:41 14 is a protected act. So the government cannot introduce  
15:46:44 15 evidence of the bill or the law that was passed, but the  
15:46:50 16 government could enter other evidence.

15:46:52 17 So, for example, in Lee, the defendant there, the  
15:46:57 18 government had alleged that the defendant submitted a  
15:47:00 19 voucher for a trip and that that voucher was, was false,  
15:47:05 20 that the trip was actually for personal reasons.

15:47:08 21 The Court said: Well, the trip may or may not be  
15:47:11 22 legislative. He may or may not have engaged in  
15:47:14 23 protected activity. But the voucher itself is not  
15:47:18 24 protected. The representations he made in the voucher  
15:47:21 25 are not protected.

15:47:23 1 And so that's a situation where you very well could  
15:47:24 2 have some aspect of the conduct that's protected. But  
15:47:27 3 the charged conduct, the misrepresentations in the  
15:47:30 4 voucher is not protected.

15:47:34 5 THE COURT: Okay. All right. Thank you.

15:47:34 6

15:47:34 7 RULING BY THE COURT

15:47:38 8 THE COURT: All right. Before the Court is the  
15:47:39 9 defense motion to dismiss for violation of the Speech or  
15:47:43 10 Debate Clause.

15:47:43 11 The Court has undertaken a review of the  
15:47:49 12 indictment, a detailed review of the indictment. The  
15:47:51 13 Court engaged in inquiry with counsel with respect to  
15:47:55 14 certain paragraphs. That is not to suggest the Court  
15:47:58 15 didn't review the entire indictment.

15:48:01 16 The Court is certainly appreciative of the  
15:48:08 17 defense's position, but is not persuaded by it. The  
15:48:11 18 acts that are charged here, that are labeled as  
15:48:15 19 objectionable and subject of criminal exposure, the  
15:48:25 20 Court doesn't find that they are even close to  
15:48:27 21 legislative acts.

15:48:30 22 Given some of the examples that the Court used with  
15:48:33 23 its hypothetical with the tire, for example -- the Court  
15:48:35 24 doesn't even need to get to the hypothetical. But just  
15:48:38 25 looking at the face of the indictment and where the nub

15:48:40 1 of the conduct is outlined, paragraph 10, for instance,  
15:48:54 2 it is hard to conceive of a way that submitting an  
15:48:57 3 invoice for work that was never done, how that can be a  
15:49:00 4 legislative act worthy of protection that is outlined in  
15:49:05 5 the Speech or Debate Clause.

15:49:07 6 Similarly, with respect to paragraph 11, submitting  
15:49:12 7 an invoice and receiving funds on that invoice for work  
15:49:17 8 that was undertaken and completed before election to the  
15:49:23 9 legislature, it is hard to conceive how that can be  
15:49:25 10 viewed as a legislative act.

15:49:29 11 Similarly, obtaining cash advances and converting a  
15:49:35 12 portion of that cash advance for personal use, it is  
15:49:39 13 hard to conceive how that can be regarded as a  
15:49:42 14 legislative act.

15:49:44 15 And finally, obtaining a cash advance for payment  
15:49:46 16 to the Danish National Archives, when those funds had  
15:49:54 17 already been used and obligated for that purpose, and  
15:49:59 18 then doing it again for the same expense, it's hard to  
15:50:03 19 conceive how that can be regarded as a legislative act.

15:50:07 20 And doing what the defense suggests -- and of  
15:50:11 21 course the Court is duty-bound to look at the indictment  
15:50:14 22 as a whole, at -- in context, the circumstance -- the  
15:50:20 23 outcome doesn't, doesn't change.

15:50:24 24 Looking at -- I believe the defense suggested  
15:50:29 25 looking at paragraph 4, for instance -- that is, what

15:50:33 1 Senator James proposed to do -- and coupling that with  
15:50:40 2 some of the examples that the Court pointed out.

15:50:42 3 Coupling that paragraph 4, proposed use of  
15:50:45 4 legislative funds, and the allegations at paragraphs 8,  
15:50:48 5 9, 10, 11, or looking at the indictment as a whole, the  
15:50:54 6 Court is hard-pressed to find anything that comes close  
15:50:57 7 to an allegation that would implicate legislative  
15:51:02 8 activity.

15:51:03 9 To be sure, there is certainly conduct that is  
15:51:08 10 referred to in the indictment that indicates, for  
15:51:14 11 instance, that Mr. James was a senator and that there  
15:51:18 12 was discussion of the Fireburn and an intention to  
15:51:26 13 propose legislation and propose the use of funds for  
15:51:31 14 things related to the Fireburn.

15:51:34 15 Significantly, though, the case law doesn't support  
15:51:36 16 the outcome that's urged by the defense. And that is  
15:51:41 17 that somehow the mention or the proximity of a  
15:51:46 18 discussion of the Fireburn somehow transforms what is  
15:51:57 19 nonlegislative activity into legislative activity.

15:52:01 20 The case law in this circuit is very clear, Lee,  
15:52:05 21 Helstoski, just to name a few, McDade, that certain  
15:52:10 22 acts, in and of themselves, do not constitute  
15:52:13 23 legislative acts worthy of the protection afforded by  
15:52:16 24 the Speech or Debate Clause.

15:52:18 25 Now, to the extent that there is no violation of

15:52:24 1 the Speech or Debate Clause on the, in the indictment,  
15:52:30 2 and for the sake of argument, assuming that you can go  
15:52:35 3 behind the grand jury and review the grand jury  
15:52:43 4 testimony, again, the defense has submitted the grand  
15:52:47 5 jury transcript of a witness, and the Court has reviewed  
15:52:50 6 that testimony.

15:52:53 7 And while arguably at pages, I believe, 21  
15:52:56 8 through 26, there might be some mention of what  
15:53:01 9 Mr. James intended to do during his tenure as a senator  
15:53:05 10 with respect to the Fireburn, and while arguably that  
15:53:09 11 may not have been necessary to return an indictment, it  
15:53:16 12 does not reach the level of permeation that was  
15:53:19 13 discussed and contemplated in Helstoski, such that the  
15:53:23 14 entire process is so infected that it warrants  
15:53:29 15 dismissal.

15:53:30 16 Finally, the Court will note that -- well, let me  
15:53:33 17 just note this final part.

15:53:35 18 The Court has reviewed the entirety of the  
15:53:38 19 transcript and the submissions, the supplemental  
15:53:40 20 transmission -- submissions of the defense, and the  
15:53:42 21 Court finds that the outcome has not changed. There's  
15:53:46 22 nothing in any of the submissions that indicate that,  
15:53:51 23 one, the grand jury proceedings were so permeated by  
15:53:54 24 violations that they warrant dismissal; or two, that  
15:53:58 25 suggests that anything in the indictment is a violation



15:54:04 1 of the Speech or Debate Clause.

15:54:08 2 Finally, the Court notes that the Speech or Debate  
15:54:12 3 Clause protection is really something that goes to a use  
15:54:16 4 privilege. And given the -- this matter has been raised  
15:54:20 5 before the Court and the Court is certainly alert to --  
15:54:23 6 alerted to the concern, and given that Mr. James was at  
15:54:29 7 one time Senator James, the Court is certainly mindful  
15:54:33 8 that things undertaken in his legislative capacity that  
15:54:36 9 are truly legislative acts, that those matters should  
15:54:42 10 never be brought before any jury. And the Court is  
15:54:46 11 certainly mindful of that and will be vigilant during  
15:54:50 12 any such trial of that matter to make sure that the use  
15:54:54 13 privilege is one that is protected.

15:55:11 14 Is there something else we need to tend to,  
15:55:14 15 Attorney Vaughn?

15:55:14 16 Let me finally say, the motion is denied.

15:55:17 17 Yes, Attorney Vaughn?

15:55:18 18 MS. VAUGHN: Your Honor, I just want to clarify  
15:55:19 19 for the record, too, that the government does maintain  
15:55:21 20 its objection that the Revised Organic Act applies in  
15:55:24 21 the first place.

15:55:25 22 THE COURT: Yes. I think I made a ruling on  
15:55:27 23 that. It's 1572, correct?

15:55:30 24 MS. VAUGHN: Yes.

15:55:30 25 THE COURT: Yes. And the Court is mindful.

15:55:31 1 And I think the government's position is this, if I  
15:55:34 2 recall from our February discussion: Is that a state  
15:55:38 3 legislator receives no protection in the Speech or  
15:55:43 4 Debate Clause. But the Court is mindful that the  
15:55:44 5 Supreme Court case that addressed that speaks to, unless  
15:55:49 6 the Congress so provided, and the Court finds that 1572  
15:55:52 7 is one of those instances where the Congress  
15:55:59 8 specifically provided and explicitly put in the language  
15:56:01 9 of the Speech and Debate Clause.

15:56:03 10 So the Court regards the protection in 1572 as  
15:56:06 11 something that attaches here, because as the Court  
15:56:08 12 recalls, it is a provision that specifically refers to  
15:56:13 13 the Virgin Islands Legislature. And the provision  
15:56:18 14 reads, "No member of the legislature shall be held to  
15:56:21 15 answer before any tribunal other than the legislature  
15:56:24 16 for any speech or debate in the legislature, and the  
15:56:27 17 member shall in all cases, except treason, felony or  
15:56:31 18 breach of the peace, be privileged from arrest during  
15:56:33 19 their attendance at sessions of the legislature and in  
15:56:36 20 going to and returning from the same."

15:56:39 21 That is a provision that applies specifically to  
15:56:41 22 the Virgin Islands Legislature . It is a provision in,  
15:56:45 23 significantly, a federal law. And the Court finds that  
15:56:49 24 the concern raised by the government and one that was  
15:56:57 25 addressed by the U.S. Supreme Court in Gillock is -- the

15:57:07 1 circumstances presented in Gillock are a little bit  
15:57:09 2 different. That was a Tennessee legislator where there  
15:57:12 3 was no such provision in federal law relating to the  
15:57:15 4 Tennessee Legislature.

15:57:17 5 And there is one that relates to the Virgin Islands  
15:57:20 6 Legislature. The Court is duty-bound to consider that  
15:57:22 7 and honor and cannot ignore it.

15:57:27 8 So the Court's holding, which I believe was evident  
15:57:33 9 before, the Court understands the government objects to  
15:57:35 10 that, and the Court doesn't see any reason to change its  
15:57:38 11 holding.

15:57:39 12 I believe that covers the motion in its entirety.  
15:57:42 13 Attorney Jupiter, is there anything else?

15:57:44 14 MR. JUPITER: No, Your Honor.

15:57:45 15 THE COURT: Okay.

15:57:46 16 Attorney Vaughn, is there anything else?

15:57:47 17 MS. VAUGHN: Yes, sorry, Your Honor.

15:57:50 18 The government would also like to clarify as to  
15:57:52 19 whether the Court will be issuing a written opinion or  
15:57:55 20 if this is the Court's, the Court's ruling.

15:57:58 21 THE COURT: I will -- the Court's intention is  
15:58:03 22 to, at the very least, issue an order. I think I've  
15:58:06 23 been fairly explicit in what I've said from the bench,  
15:58:10 24 although the Court will probably issue an order that  
15:58:12 25 will indicate, "for the reasons outlined by the Court

15:58:15 1 during the hearing," and then issue the order that  
15:58:20 2 officially denies the -- or not "officially"; it is very  
15:58:24 3 official, it is denied. But we'll have a separate order  
15:58:27 4 issued. And I can do that today.

15:58:32 5 If the government is asking whether there will be a  
15:58:34 6 separate memorandum opinion, to the extent the Court  
15:58:40 7 refers to its reasons that are outlined here from the  
15:58:43 8 bench, there will be none.

15:58:46 9 But to the extent the Court has some time between  
15:58:55 10 now and the trial of this matter, which I think is set a  
15:59:00 11 week from this coming Monday, if I'm not mistaken, I  
15:59:03 12 think it's the 24th of July; is that correct?

15:59:07 13 MR. JUPITER: Yes.

15:59:07 14 And for scheduling purposes, Your Honor, we will be  
15:59:10 15 seeking an interlocutory appeal.

15:59:13 16 THE COURT: Okay. Then we'll make sure that we  
15:59:15 17 get something else, although I think this is fairly  
15:59:21 18 explicit, so that the defense can file its petition as  
15:59:25 19 soon as possible. All right.

15:59:27 20 I expect that the government will be -- I don't  
15:59:30 21 know if the government is planning to file a futility  
15:59:36 22 motion or not, or if the government needs some time to  
15:59:39 23 consider that, but, Attorney Vaughn, did you have a  
15:59:42 24 thought on that one way or the other?

15:59:44 25 MS. VAUGHN: I do, Your Honor. Given the

15:59:46 1 posture that we're in now, that the Third -- that we  
15:59:49 2 have gone to the Third Circuit once, that the Court sent  
15:59:53 3 it back down for review before -- and so that it could  
15:59:58 4 review it before trial, the government is likely not  
16:00:02 5 going to be filing an additional motion, a futility  
16:00:06 6 motion.

16:00:06 7 So given that, and given that the defendant has a  
16:00:09 8 right to an interlocutory appeal, the government would  
16:00:13 9 propose maybe instituting a similar procedure as to what  
16:00:16 10 we did before, where we update the Court once a month as  
16:00:19 11 to the status of the interlocutory appeal, and then have  
16:00:22 12 a status hearing once we know the Third Circuit's  
16:00:26 13 schedule, so that we can set a more firm trial after the  
16:00:29 14 appeal is resolved.

16:00:30 15 THE COURT: All right. Okay. All right.  
16:00:33 16 Thank you, Counsel.

16:00:34 17 I'll see counsel in chambers in five minutes.

16:00:38 18 (Court in recess at 4:00 p.m.)

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CERTIFICATE

This document is hereby certified  
to be a true and accurate transcript  
of the foregoing proceedings.

/s \_\_\_\_\_  
Chandra Kean, RMR  
Official Court Reporter

July 30, 2017  
DATE